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No. 91-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FOOD GIANT, INC.,

Petitioner,

v.

WILLIAM C. PORTER,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of Georgia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a denial of pension benefits occurs years after the effective date of ERISA, is a cause of action based on that denial excepted from ERISA's expansive preemption provision simply because some of the acts or omissions related to that cause of action occurred prior to the effective date of ERISA?

2. When Congress granted the state courts limited jurisdiction concurrent with federal courts under ERISA, whether it intended as part of ERISA's uniform system of pension plan administration that there be consistent and uniform interpretations of the federal substantive law governing such claims?

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---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Food Giant, Inc. respectfully petitions for a writ of certiorari to review the opinion and judgment of the Court of Appeals of Georgia in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at 198 Ga. App. 736, 402 S.E. 2d 766 (Pet. App. 1a). The order of the Supreme Court of Georgia denying the petition for certiorari from the Court of Appeals of Georgia (Pet. App. 6a) is not yet reported. The opinion of the State Court of DeKalb County, Georgia (Pet. App. 7a) is unreported.[1]

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[1] The caption in this case lists all parties who were also parties to proceedings in the court whose judgment is sought to be reviewed. The other defendant in the underlying state case, Max Alterman, did not participate in the proceedings before the Georgia Court of Appeals. Petitioner Food Giant, Inc. was formerly a subsidiary of

JURISDICTION

The judgment and opinion of the Court of Appeals of Georgia was entered on February 13, 1991. The petition for certiorari to the Supreme Court of Georgia was denied on May 15, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISION INVOLVED

This case involves Section 514 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1144, which provides in pertinent part:

> OTHER LAWS
>
> (a) Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> (b) Construction and application
>
> (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

STATEMENT OF THE CASE

William C. Porter was employed by Petitioner Food Giant, Inc. or its predecessor company from October 1957

Delhaize the Lion America, Inc., a Delaware corporation. Delhaize the Lion America, Inc. is a subsidiary of Delhaize Freres et Cie, "Le Lion" S.A., a Belgian company. On September 5, 1986, Food Giant was sold to Super Valu Stores, Inc. and later merged into Super Valu (on February 25, 1989). Delhaize the Lion America, Inc. indemnified Super Value against any liabilities that arose prior to the sale, including any liabilities from this case.

until he voluntarily left the employ of Food Giant in July 1970. Porter Dep. at 5-6.[2] From 1970 to 1973, Porter was employed by another company. *Id.* at 12. He returned to Food Giant in February 1973 and remained a Food Giant employee until he again voluntarily left his job in October 1982. *Id.* at 25.

In 1967 Food Giant adopted a defined benefit pension plan for its salaried employees that became effective on April 17, 1967. The 1967 Plan had a provision that provided for full vesting of the benefits only for those employees having 15 years of continuous service. An employee who voluntarily terminated his employment before he was so vested forfeited all service prior to the date of termination. Porter Dep. at 9, 18. Porter was never vested in the 1967 Plan because he left Food Giant with nearly 13 years of continuous service. When he voluntarily left Food Giant in 1970, Porter was aware that he had forfeited all service credit under the 1967 Plan. *Id.* at 12, 18.

Following the enactment of ERISA, Food Giant amended and restated the 1967 Plan. This revised plan, which became effective on April 1, 1976, required that an employee have 10 years of continuous service in order to be fully vested. Porter was never vested in the 1976 Plan because he accumulated only nine years of continuous service, from February 1973 until he again voluntarily left the employ of Food Giant in October 1982. Porter Dep. at 24-25. Under the terms of the 1976 Plan, an employee who voluntarily terminated his employment before he was vested forfeited all service prior to the date of termination.

Despite his almost three-year absence from employment with Food Giant, Porter claims that he is entitled

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[2] "Porter Dep." refers to the deposition of William C. Porter taken on January 19, 1990 in the civil action in the State Court of DeKalb County. It was a part of the record before the court below.

to pension benefits because of an alleged oral promise made in 1973 by Max Alterman, then an officer of Alterman Foods, which was acquired by Food Giant in 1980. Porter Dep. at 28-30. Alterman allegedly promised Porter that if he would return to Food Giant, his prior years of service would be treated as continuous service and, in effect, combined with his future employment for purposes of seniority notwithstanding the Plan's break-in-service provision. Porter Dep. at 16-17. The alleged oral agreement was never committed to writing. *Id.* at 18.[3]

In 1986 Porter filed suit against Food Giant and Max Alterman in the State Court of DeKalb County seeking to recover pension benefits under a state law theory of breach of contract. Food Giant filed a motion to dismiss, contending that Porter's claim was preempted and barred by ERISA, but that motion was denied. Porter then filed an amended complaint, restating his state law claims and adding an alternative claim under ERISA.

The action was removed to the United States District Court for the Northern District of Georgia but then was remanded to state court because Alterman had not joined Food Giant's petition for removal in a timely fashion (Pet. App. 13a). The parties proceeded with discovery and on the basis of Porter's deposition testimony, Food Giant moved for summary judgment. After briefing and argument, the state court found that Porter's state law claims were preempted by ERISA (Pet. App. 8a), dismissed all state law claims against Food Giant and directed entry of final judgment as to those claims (*id.*), making the ERISA claim the only remaining claim against Food Giant (Pet. App. 11a).

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[3] According to Porter, Alterman expressed a strong desire that the alleged oral agreement be kept secret from other employees. Porter therefore agreed to waive the additional vacation time he would ordinarily have been entitled to on the basis of his enhanced seniority in order to avoid making other employees suspicious. Porter Dep. at 16-17, 21-22.

Porter appealed and, by decision of February 13, 1991, the Court of Appeals of Georgia reversed (Pet. App. 1a). It found Porter's state law claims exempt from ERISA's preemptive effect pursuant to the "act or omission" exception to preemption set forth in section 1144(b)(1). The Court of Appeals denied Food Giant's motion for rehearing. Food Giant then petitioned the Supreme Court of Georgia for a writ of certiorari to review the Court of Appeals' decision. The Supreme Court of Georgia denied Food Giant's petition for certiorari on May 15, 1991 (Pet. App. 6a).

REASONS FOR GRANTING THE WRIT

1. ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478, 482 (1990); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). As part of this closely integrated regulatory system, Congress expressly included a broadly worded preemption provision to establish employee benefit plan regulation as an exclusively federal concern and to ensure the application of a uniform body of employee benefit law. *Ingersoll-Rand* v. *McClendon*, 111 S.Ct. at 484; *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987).

To continue to allow state-based actions after ERISA subjects plan sponsors to the very kind of disruptive burdens, and subjects employee-participants to the uncertain interpretation of federally mandated plan provisions, that Congress sought to foreclose through the preemption provision. Such a result is "fundamentally at odds with the goal of uniformity that Congress sought to implement" in enacting ERISA. *Ingersoll-Rand* v. *McClendon*, 111 S.Ct. at 484.

2. The eight federal courts of appeals that have considered the issue are in conflict as to the meaning of the narrow exception to the broad preemption provision in-

cluded by Congress in ERISA. The Georgia Court of Appeals selected from among the several possible federal court interpretations one that conflicts with the view of the majority of the federal Circuits and is the least consistent with congressional intent and this Court's rulings that exceptions to federal preemption under ERISA are to be narrowly construed.

The Georgia Court adopted the *ad hoc*, fact-based approach of the First, Second and Ninth Circuits which substantially undermines the uniformity and certainty ERISA was intended to provide. The majority view represented by the Third, Fourth, Fifth, Seventh and Eighth Circuits, on the other hand, narrowly construes the statutory exception to the broad preemption provision of ERISA, as intended, and thus in most cases assures federal preemption. It both provides the certainty intended by Congress and is fair and equitable in its application to employees, employers and plan sponsors.

3. Because ERISA permits state courts limited concurrent jurisdiction with federal courts,[4] several states have also ruled on the meaning of ERISA's preemption provision, each relying on conflicting federal precedent.[5] The decision of the Georgia Court of Appeals has added to the conflicts among the state courts that have considered the preemption provisions and has underscored

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[4] Civil actions brought by a plan participant or beneficiary to recover benefits or employee rights under a plan, or "to clarify his rights to future benefits under the terms of the plan," 29 U.S.C. § 1132(a)(1)(B), may be brought in either a federal district court or a state court of competent jurisdiction, which "shall have concurrent jurisdiction of [such] actions." 29 U.S.C. § 1132(e)(1). All other ERISA claims must be brought in a federal district court. 29 U.S.C. § 1132(e)(1).

[5] *See Wayte* v. *Rollins Int'l Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (1985); *Grich* v. *Wood & Hyde Leather Co.*, 74 A.D. 2d 183, 427 N.Y.S. 2d 96 (3d Dept. 1980); *Petrolite Corp.* v. *Barnhouse*, 1991 Tex. App. LEXIS 924 (13th Dist. Ct. App. April 11, 1991).

the conflict among the federal Circuits. It further exacerbates the confusion on the meaning of the exception to ERISA preemption.

4. Significantly, the Georgia Court of Appeals decision creates an irreconcilable conflict between the state and federal courts of Georgia. Two different rules of decision regarding the ERISA preemption provision now govern employee benefit disputes in Georgia, thus creating a situation fundamentally at odds with ERISA's purposes. *See Ingersoll-Rand* v. *McClendon*, 111 S.Ct. at 484. In rejecting the law of its own Eleventh Circuit, the Georgia court has undermined the congressional goals of uniformity, integration, exclusivity and comprehension.[6] It has permitted litigants in Georgia to choose their forum for litigation of employee benefit claims based upon whether state or federal law appears more advantageous. This result is incongruous because the underlying statute was designed to create one substantive law of benefits.

I. THE DECISION OF THE GEORGIA COURT OF APPEALS IS FUNDAMENTALLY AT ODDS WITH THE INTENT OF CONGRESS IN ENACTING ERISA AND WITH EVERY DECISION OF THIS COURT INTERPETING IT.

As this Court has recently reiterated, ERISA is "a comprehensive statute" that sets "uniform standards" and "whose closely integrated regulatory scheme" has among its most "prominent . . . safeguards" a "broad preemption provision." *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 482. *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 90-91. Through ERISA Congress "meant to es-

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[6] While the Eleventh Circuit has not itself considered the matter at issue here, it is bound under *Bonner* v. *City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), by decisions of the Fifth Circuit decided prior to September 30, 1981. The Georgia Court of Appeals expressly declined to follow relevant Fifth Circuit precedent.

tablish pension plan regulation as exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). The intent of Congress was "to ensure that plans and plan sponsors would be subject to a uniform body of benefit law" and to "minimize the . . . burdens of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand* v. *McClendon*, 111 S. Ct. at 484.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), therefore preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). This preemption clause "is conspicuous for its breadth." *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990). Its "deliberately expansive language" was designed to establish pension plan regulation as "exclusively a federal concern." *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. at 482, quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. at 46.

The legislative history of ERISA makes plain that section 514's "preemptive scope was as broad as its language." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 98 (citing H.R. Conf. Rep. No. 93-1280 at 383 (1974); S. Conf. Rep. No. 93-1090 at 383 (1974)). Senator Williams, one of the chief sponsors of the ERISA legislation, stated that with narrow exceptions ERISA was intended to "preempt the field," and the principle of preemption was "intended to apply in its broadest sense." 120 Cong. Rec. 29,933 (daily ed. August 22, 1974) (remarks of Sen. Williams). Senator Javits spoke of "a comprehensive and pervasive Federal interest and the interests of uniformity." 120 Cong. Rec. 29,942 (daily ed. August 22, 1974) (remarks of Sen. Javits). Representative Dent described the reservation to the federal government of the "sole power to regulate the field of employee benefit plans" as

ERISA's "crowning achievement." 120 Cong. Rec. 29,197 (daily ed. August 22, 1974) (remarks of Rep. Dent). *See Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. at 47; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 98-100.

To continue to allow litigants to pursue employee benefit plan related claims based on state law after the effective date of ERISA, except in the narrowest of circumstances, would subject plans and plan sponsors to the very kind of "disruptive burdens" that Congress intended to foreclose through the preemption provision. Such a result would be "fundamentally at odds with the goal of uniformity that Congress sought to implement" in enacting ERISA. *Ingersoll-Rand* v. *McClendon*, 111 S. Ct. at 484. Yet that is precisely the impact of the decision of the Court of Appeals of Georgia in this case.

The central issue here was whether a plan administrator's 1982 determination to deny pension benefits escapes ERISA preemption because it was based in part on certain acts that occurred prior to ERISA's January 1, 1975 effective date. The Georgia Court of Appeals held that such pre-ERISA "acts," in this case an alleged formation of an oral contract to ignore a break in service and the alleged reliance on that oral contract, were sufficient to remove a claim from ERISA's jurisdiction and permit suit on the state law breach of contract claim instead.

By reading the exception to the broad preemption provision expansively rather than narrowly, as Congress intended, the Georgia Court of Appeals permitted a plan participant in Georgia to rely on state law and pre-ERISA conduct in adjudicating his pension claim nearly two decades after Congress made pension plan regulation "exclusively a federal concern." *Alessi* v. *Raybestos Manhattan, Inc.*, 451 U.S. at 523. That is not what Congress intended.[7]

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[7] Moreover, Congress specifically addressed the effects of pre-ERISA service and pre-ERISA breaks in service as they relate to

II. THERE IS A CLEAR AND DIRECT CONFLICT AMONG THE CIRCUITS AS TO THE MEANING OF THE EXCEPTION TO THE BROAD FEDERAL PREEMPTION PROVISION ENACTED BY CONGRESS IN ERISA.

Section 514 of ERISA expressly provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This broad preemption provision is modified by a narrow exception: "This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1).

The federal courts of appeals that have addressed the first part of the exception agree on its meaning: a cause of action arises at the time a claim for pension benefits is denied.[8] The eight courts of appeals that have considered the issue are split, however, on the meaning of the other part of the exception, "any act or omission which occurred" before the effective date of ERISA. The view taken by the Georgia Court of Appeals here and by three of the eight Circuits would make the broad preemption provision of ERISA almost meaningless.

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vesting under a plan subject to ERISA. *See e.g.*, 29 U.S.C. § 1053(b)(1)(C), (F). Indeed, ERISA permits the application of pre-ERISA break in service rules to pre-ERISA breaks. 29 U.S.C. § 1053(b)(1)(F).

[8] *See Rodriguez* v. *MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. denied*, 110 S.Ct. 202 (1989); *Degan* v. *Ford Motor Co.*, 869 F.2d 889, 894 (5th Cir. 1989); *Tanzillo* v. *Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985); *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1498 (9th Cir. 1984); *Quinn* v. *Country Club Soda Co.*, 639 F.2d 838, 840 (1st Cir. 1981).

A. The Minority View

The Georgia Court of Appeals in this case rejected the view of its own Circuit—the Eleventh by way of the Fifth—in favor of the minority view adopted by the First, Second and Ninth Circuits.[9] Those Circuits have held that even if a denial of pension benefits occurs after January 1, 1975, thus giving rise to a cause of action after ERISA's effective date, ERISA does not apply and there is no federal court subject matter jurisdiction, so long as any "significant" act or omission related to the denial of benefits took place before January 1, 1975.

In cases where the cause of action arises after the effective date of ERISA, January 1, 1975, these three Circuits inquire whether there were so-called "significant" (sometimes called "critical," "central" or "substantial") acts or omissions that occurred before the effective date of ERISA—or whether there were pre-ERISA acts or omissions that, in the words of some decisions, led "inexorably" to a post-ERISA denial of benefits. These Circuits countenance an *ad hoc*, fact-based analysis concerning what pre-ERISA acts occurred and how significant they were; this in turn determines, years after ERISA's effective date, whether federal or state law applies.

This approach inevitably leads to uncertainty and lack of uniformity in interpreting and applying the comprehensive scheme that is ERISA. A court is forced to speculate in a retrospective analysis what acts are "significant" or "substantial" and what actions led "unambiguously," "inexorably" or "unequivocally" to a denial of benefits.[10] This analysis of intangibles permits a review-

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[9] *Quinn* v. *Country Club Soda Co.*, 639 F.2d 838 (1st Cir. 1981); *Lamontagne* v. *United Wire, Metal & Plaster Pension Fund*, 869 F.2d 153 (2d Cir.) *cert. denied*, 110 S.Ct. 72 (1989); *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984); *Shatto* v. *Evans Products Co.*, 728 F.2d 1224 (9th Cir. 1984).

[10] Thus, in the First, Second and Ninth Circuits, if a plan containing an "unambiguous" and "nondiscretionary" provision was adopted

ing court to find that although a claim for benefits was not made until after ERISA's effective date, even a secret, oral promise made before January 1, 1975, as here, will preclude ERISA preemption.[11] It substantially undermines the policy choices made by Congress to include certain remedies and exclude others because it permits plan participants and beneficiaries to obtain state law remedies that Congress rejected in enacting ERISA. *See Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. at 485.

B. The Majority View

Another group of Circuits—consisting of the Third, Fourth, Fifth, Seventh and Eighth [12]—takes the diametrically opposite point of view. They conclude that ERISA nearly always preempts state law if benefits are denied after January 1, 1975. This is because (1) the cause of action arises when the benefits are denied, and (2) the only "significant" or "critical" act is that same denial because it necessarily involves a contemporaneous construction of the plan's provisions. While acknowledging

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before the effective date of ERISA, or if the post-ERISA denial of a claim was the "inevitable result" of "unequivocal pre-effective date interpretations" or "exercises of discretion" under the plan, state law, not ERISA, governs. *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d at 1501-04; *see Quinn* v. *Country Club Soda Co.*, 639 F.2d at 841. In such circumstances, absent diversity of citizenship, these Circuits conclude that the federal courts lack subject matter jurisdiction over such claims.

[11] Furthermore, this approach leaves plan fiduciaries subject to stale claims for many years. It would permit an ERISA claim based upon a denial of benefits after the year 2000 to be preempted as a result of events that occurred in 1973.

[12] *Tanzillo* v. *Local Union 617 Int'l Bhd. of Teamsters*, 769 F.2d 140 (3d Cir. 1985); *Rodriguez* v. *MEBA Pension Trust*, 872 F.2d 69 (4th Cir.), *cert. denied*, 110 S.Ct. 202 (1989); *Degan* v. *Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989); *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981); *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982); *Winer* v. *Edison Bros. Stores*, 593 F.2d 307 (8th Cir. 1979).

that the determination of a claim may require the plan trustees to consider pre-ERISA facts or events, including some that may appear substantial or significant, these courts invariably conclude that given Congress' clear intention that ERISA preemption be broadly construed, the ultimate determination by the plan administrator normally must be regarded as the only truly critical act.

The Fifth Circuit also has rejected the minority approach, holding that the "act or omission" exception refers only to those acts or omissions that set in motion legal proceedings other than causes of action, such as "pension-related state administrative proceedings or criminal prosecutions, which certainly cannot be characterized as causes of action." *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d at 971. The Fifth Circuit's rationale is similar to that of the Third, Fourth, Seventh and Eighth: to interpret the "act or omission" to "except from ERISA preemption any suit in which some of the facts occurred prior to 1975, would render the first clause of section 1144(b)(1) superfluous." *Degan* v. *Ford Motor Co.*, 869 F.2d at 894.[13]

The benefits of the majority approach are apparent and completely consonant with congressional intent. First, it assures that ERISA applies and there is full federal preemption of the field as soon as practicable, rather than permitting resort to state law years after ERISA was enacted. Second, it means that the statutory exception to the broad preemption provision of ERISA is construed as narrowly as possible, as Congress intended. Third, this approach provides the kind of certainty of application envisioned by Congress: in most cases the

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[13] On facts very similar to those involved here, Degan was not permitted to rely on Ford's and the union's pre-1975 oral assurances as "acts or omissions" that would exempt his cause of action from ERISA's preemptive reach. *Degan* v. *Ford Motor Co.*, 869 F.2d at 894.

courts need only look at the date of the trustees' determination granting or denying a claim to see if ERISA applies. Finally, it is equitable: it neither requires plan participants to be ever-vigilant in inquiring about plan benefits that may be lost because of the timing of certain "critical acts," nor does it permit discrimination in benefits (which the provisions of ERISA also sought to eliminate) through allegedly secret understandings, like Porter's here, permitting such discrimination.

As the Fourth Circuit explained in *Rodriguez*:

> Such a view fosters the congressional intent "to extend the protections of ERISA . . . as soon as practicable," so as to provid[e] . . . ready access to the Federal courts." 29 U.S.C. § 1001(b). It also promotes Congress' intention that exceptions to ERISA's preemption provisions be narrowly construed. Further, [this] approach has the advantage of certainty. Courts need only look to the date of the trustees' determination to decide whether ERISA applies. Finally, equitable considerations support this standard. Plan participants cannot be expected to inquire about benefits until retirement. Because plan trustees will not act on a participant's claim until it is made, their act of denying a claim will inevitably involve a post-ERISA interpretation of the plan.

Rodriguez v. *MEBA Pension Trust*, 872 F.2d at 72-73 (citations omitted).

The two approaches adopted by the federal Circuits yield decidedly different results. Where there is a denial of benefits based upon a break in service, the minority view considers the pre-ERISA adoption of a break in service provision by the employer and the break in service by an employee as "critical acts" that led "inexorably" to the post-ERISA denial of benefits. Thus, there is no ERISA preemption and no federal court jurisdiction absent diversity. *See Lamontagne* v. *United Wire, Metal &*

Plaster Pension Fund, 869 F.2d at 155-56. Under the same set of facts, the majority view considers the contemporaneous interpretation of the plan's provisions at the time of the post-ERISA denial of benefits as the "critical act." Thus ERISA preemtps the field. *See zillo* v. *Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d at 143-44.

In view of the significance of employee benefit plan regulation to so many individuals, families, employers and plan sponsors, resolution of this conflict by this Court is crucial to the fair resolution of future disputes.[14]

III. THE DECISION OF THE GEORGIA COURT OF APPEALS ADDS TO AND UNDERSCORES THE CONFLICT AMONG THE STATE COURTS ON THE MEANING AND SCOPE OF THE EXCEPTION TO FEDERAL PREEMPTION UNDER ERISA.

The state courts of California, Georgia, New York and Texas [15] have now considered and have reached different conclusions concerning the important federal question as to the meaning of the "act or omission" exception to the

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[14] The split among the circuits will continue to have a significant impact for years to come. As of July 1991, there were approximately 48.5 million working Americans between the ages of 40 and 64. Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings*, Table A-4, at 11 (July 1991). Almost half of those actively working in the private sector as of April 1974 participated in pension plans. S. Schieber, *Trends In Pension Coverage And Benefit Receipt*, at 6 (Employee Benefit Research Institute 1981). Therefore, for at least the next twenty years, millions of workers who were participating in pension plans for a significant period of time prior to the effective date of ERISA will be applying for benefits. The pension entitlements of these beneficiaries may be affected by a wide variety of pre-ERISA acts or omissions.

[15] *See Wayte* v. *Rollins Int'l, Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (1985); *Grich* v. *Wood & Hyde Leather Co.*, 74 A.D.2d 183, 427 N.Y.S. 2d 96 (3d Dept. 1980); *Petrolite Corp.* v. *Barnhouse*, 1991 Tex. App. LEXIS 924 (13th Dist. Ct. App. April 11, 1991).

broad ERISA preemption provision. Georgia has joined the state courts of California and New York in following the Ninth Circuit's approach, which requires an *ad hoc*, fact-based determination in each case as to whether any "significant" or "critical" acts or omissions occurred before the effective date of ERISA.[16] By contrast, the Texas Court of Appeals has endorsed the views of the Fifth and the Eighth Circuits, finding that the "critical act" is nearly always the denial of benefits.

In addition to adding to the conflict among the states, the decision by the Georgia court means that two different states, Georgia and Texas, within Circuits governed by the same body of precedent[17] have different rules of law on an important federal question. Significantly, the state law conflict between these two states has emerged only in the last several months, with the Georgia court deciding this important federal question in February 1991 (and certiorari being denied by the Supreme Court of Georgia in May) and the Texas Court deciding it in April 1991, thus dramatically underscoring the lack of uniformity and certainty facing plan participants and employers in states within the Fifth and Eleventh Circuits.[18]

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[16] In the view of the New York court, this requires factual distinctions to be made between "significant acts" and relevant but "minor acts." *Grich* v. *Wood & Hyde Leather Co.*, 427 N.Y.S. 2d at 98.

[17] *See* notes 6 *supra* and 20 *infra*.

[18] The Texas Court of Appeals, like the Fifth Circuit in *Degan* and the Georgia court here, was faced with a factual situation involving pre-ERISA oral representations never reduced to writing and not included in the terms of the retirement plan. Unlike the Georgia court, it found the "critical act or omission" to be the denial of benefits. The Texas Court of Appeals concluded that to permit a claimant to rely on such pre-ERISA promises "would render ERISA inapplicable in any case in which some of the facts occurred prior to ERISA's effective date" and "would run counter to congressional intent." *Petrolite Corp.* v. *Barnhouse*, 1991 Tex. App. LEXIS at 9-10.

Thus, not only is there serious conflict among the federal Circuits regarding this important federal question, the fact that Congress granted concurrent jurisdiction to the federal and state courts for certain ERISA claims has resulted in the federal conflict being mirrored in the state courts.

IV. THE FAILURE OF THE GEORGIA COURT OF APPEALS TO FOLLOW THE PRECEDENT BINDING ON THE FEDERAL COURTS IN GEORGIA HAS UNDERMINED THE PURPOSES AND POLITICS OF ERISA.

While a state court is not required to follow the law of its Circuit on questions of federal law, the Georgia court's failure to do so in this case is "fundamentally at odds with the goal of uniformity that Congress sought to implement" by enacting ERISA. *Ingersoll-Rand* v. *McClendon*, 111 S.Ct. at 484.[19] The intent of Congress, after all, was to "minimize the . . . burdens of complying with conflicting directives among States or between States and the Federal Government," not to add to them. *Id.* Yet the state courts of Georgia now are bound to follow a rule of decision that applies state law to a large category of claims relating to employee benefit plans and conflicts with binding precedent in the federal courts of Georgia.[20]

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[19] Other state courts have avoided the problem created by the Georgia court by following the interpretation of ERISA adopted by the United States Court of Appeals for the Circuit in which they are located. For example, the Texas court in *Petrolite* adopted a view consonant with decisions of the Fifth Circuit in *Degan* and *Woodfork*, while the California court in *Wayte* adopted the view set forth in decisions of the Ninth Circuit such as *Menhorn*.

[20] While the Eleventh Circuit has not itself considered the matter at issue here, it is bound under *Bonner* v. *City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), by decisions of the Fifth Circuit decided prior to September 30, 1981. The Georgia Court of Appeals specifically rejected the Fifth Circuit's analysis of the ERISA preemption statute as set forth in *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981), in favor of the

Henceforth in Georgia, the applicability of ERISA to a post-ERISA claim for pension benefits involving pre-ERISA acts or omissions depends solely on whether the claim is brought in state or federal court. Federal courts sitting in Georgia are bound by the Fifth Circuit's conclusion that the "act or omission" exception does not prevent ERISA preemption and therefore does not oust the federal court of jurisdiction in a case such as this, while a state court sitting literally next door to the federal court will be bound by the Georgia Court of Appeals' contrary holding that a pre-ERISA "act or omission" prohibits the application of ERISA and the exercise of federal jurisdiction. This conflict will undermine the regulatory aims of ERISA in Georgia and employers will be left with continuing uncertainty regarding their obligations and the legal standard that applies to the grant and denial of benefit claims.

The anomalous situation that exists in Georgia, where federal courts are bound by one precedent and state courts by another, inevitably will emerge in other states, further undermining ERISA's purposes and policies. In the absence of a decision by this Court, contrary interpretations by state and federal courts sitting in the same state will have the effect of transforming Congress' grant of concurrent jurisdiction from the mere convenience Congress envisioned into a virtual invitation for litigants to forum-shop between state and federal courts for the interpretation most favorable to their case. Such a conflict completely undermines Congress' stated purpose of achieving uniformity in employee benefit plan administration and creates an inevitable tension between the state and federal courts concerning the appropriate interpretation of an important issue of federal substantive law.

Ninth Circuit's analysis in *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 13, 1991

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF GEORGIA

A90A2323, A90A2324

PORTER

v.

FOOD GIANT, INC.; and vice versa

[Feb. 13, 1991]

ANDREWS, Judge.

This appeal arises from the action of Food Giant, Inc. (appellee in Case No. A90A2323 and cross-appellant in Case No. A90A2324), in denying the retirement benefits application of William C. Porter (appellant in Case No. A90A2323 and cross-appellee in Case No. A90A2324). On appeal Porter enumerates as error the award by the Superior Court of DeKalb County, in its order of July 17, 1990,[1] of summary judgment to Food Giant on the basis that Porter's contract and tort claims are preempted by the Employee Retirement Income Security Act of 1974, as amended, 29 USC 1001, *et seq.* ("ERISA"). Food Giant enumerates as error the trial court's denial of summary judgment on Porter's claims under the company's pension plans and ERISA, 29 USC 1132 (a)(1) (B).

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[1] The order dismissed Counts 1 and 2 of Porter's amended complaint, alleging breach of contract and vicarious liability on Food Giant's part; and also those portions of counts 6 and 7 which sought attorney fees and exemplary damages for bad faith and aggravating conduct by Food Giant. This order was clarified *nunc pro tunc* in an order entered August 30, 1990.

1. Beginning October 10, 1957, appellant Porter was employed by the predecessor of Food Giant, Inc., Alterman Bros., Inc., in several positions in Alterman Bros.' food retailing business. In July 1970 he voluntarily left Alterman Bros. and shortly thereafter went to work for McCormick Spice Co. In early 1973 he was contacted by Sam Alterman, president of Alterman Bros., regarding the possibility of Porter's rejoining the firm as manager of one of the company's retail stores. Upon Sam Alterman's request, Porter went to the firm's headquarters, where he conferred with Max Alterman, vice-president of the firm, who also served as director of retail store operations and secretary of the firm's retirement program. According to Porter's testimony (subsequently confirmed by Max Alterman in an October 1984 letter to Food Giant's Insurance Director, and also in an affidavit, as well as in his answer to the original complaint), Porter agreed to return to Alterman Bros. on the express condition that his seniority rights be reinstated as if there had been no break in service, with the sole exception that his vacation time would not exceed that granted new employees. Both Porter and Alterman stated that Alterman had requested, during their discussion of these terms of Porter's reemployment, that Porter not mention to fellow employees the restoration of his seniority.

According to the record, Porter immediately tendered his resignation to McCormick and reported for work with Alterman Bros. that same week, on February 15, 1973. In October 1982 he decided once more to leave Alterman Bros. and did so. He subsequently applied for pension benefits based on service of approximately 22½ years. The insurance director of Food Giant, which had acquired Alterman Bros, in the interim, informed him that he was not vested for a pension under either of the company's successive pension plans (1967, 1976). The company subsequently alleged that Porter was also ineligible for retirement benefits under the terms of ERISA, which, it was alleged, had preempted the field.

The code section on which this case must ultimately turn is 29 USC § 1144 (b) (1), which provides: "This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." In the instant case plaintiff's cause of action—Food Giant's denial of his application for retirement benefits—indisputably accrued after January 1, 1975, and would therefore not come under the "cause of action" exception to ERISA preemption. Porter contends, however, that the "act or omission" exception does not apply to his case, thereby eliminating ERISA, inasmuch as "the substantial conduct [i.e., the 1973 rehiring of Porter and the representations made] forming the basis of the cause of action occurred before January 1, 1975." *Wayte v. Rollins, Int'l.*, 215 Cal. Rptr. 59 (169 Cal. App. 3d 1) (1985), summarizing the Ninth Circuit decisions which the *Wayte* court believed to embody the most reasonable and desirable interpretation of the "acts or omissions" clause.

The federal circuits are divided almost evenly as to the intent and effect of this clause,[2] certain ones of them (e.g., the Fifth Circuit in the 1981 case of *Woodfork v. Marine Cooks and Stewards Union*, 642 F2d 966) holding "act of omission" to be duplicative of, or identical with, "cause of action;" while other circuits consider it to be not mere surplusage (as the reading of Fifth Circuit and its colleagues mandates) but an entirely separate category comprising the pre-emption conduct of which the subsequent (or post-preemption) accrual of the cause of action is "merely the inevitable consequence." *Menhorn v. Firestone Tire & Rubber Co.*, 738 F2d 1496, 1502 (9th Cir. 1984). Food Giant, of course, urges the validity of the former (indeed, this is the entire thrust of the successful motion for summary judgment); Porter argues

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[2] Decisions of federal trial and intermediate courts are not binding on this court, only persuasive. *Felker v. State*, 252 Ga. 351, 361 (1b) (314 SE2d 621) (1984).

that the cases in the latter category embody the proper interpretation of the "acts or omissions" language and advance the dual intent of the legislation itself, i.e., not only to provide a set of uniform criteria for determining employee benefit plan issues, but also to prevent cluttering the federal court calendar with cases not properly or necessarily within federal courts' jurisdiction. See e.g., *Wayte*, supra.

It is contrary to the generally accepted principles for construing statutes to "read out" any part of the statute as "mere surplusage" unless there is a clear reason for doing so. See, e.g., OCGA § 1-3-1; *Exum v. City of Valdosta*, 246 Ga. 169 (269 SE2d 441) (1980). The cause of action accrues when the formal act of denial takes place, e.g., *Menhorn*, supra at 1498 (1); the "acts or omissions" which are the basis of the cause of action may have occurred at any prior time, either before or after the preemption date, January 1, 1975. See, e.g., *Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537 (9th Cir. 1980) (the only act subsequent to the preemption date was the formal act of denial); *Wayte*, supra at 67 (state court jurisdiction and application of state law not defeated because cause of action accrued after effective date if such causative factors as exhaustion of administrative remedies occurred before that date); *Menhorn*, supra (legislative history shows legislative intent, as both "cause of action" and "acts or omissions" clauses appear in Conference Committee Report); *Cowan v. Keystone Employee Profit-Sharing Fund*, 586 F2d 888 (1st Cir. 1978) (1977 denial of application for benefits allegedly underpaid in 1974 held erroneous because of "acts or omissions" clause). See also *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (107 SC 2211, 96 LE2d 1) (1987); *Jameson v. Bethlehem Steel*, 765 F2d 49 (3d Cir. 1985); *Lafferty v. Solar Turbines Intl.*, 666 F2d 408, 410 (9th Cir. 1982).

Although Food Giant offers persuasive arguments, we are reluctant to conclude, as we must to adopt that posi-

tion, that Congress did not intend every part of the statute, as finally written, to have effect. We therefore hold that, under the plain language of the statute, the acts or omissions giving rise to the cause of action occurred in 1973, when Alterman induced Porter to return to Food Giant's employ by promising him that his full seniority rights (with the single exception noted above) would be restored and that the "acts or omissions" from ERISA clearly applies. Under the criteria of OCGA § 9-11-56, the trial court's award of summary judgment on the basis of ERISA preemption was therefore error and the judgment in Case No. A90A2323 must be reversed.

2. Our holding in Division 1, supra, renders moot that portion of appellee's enumeration which pertains to ERISA. As to that portion which addresses Porter's state law claims, we find that these issues do not meet the criteria for summary adjudication. The judgment in Case No. A90A2324 must therefore be affirmed.

Judgment reversed in Case No. A90A2323. Judgment affirmed in Case No. A90A2324. Pope and Beasley, JJ., concur.

APPENDIX B

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: May 15, 1991

Mr. Christopher S. Miller
Troutman, Sanders, Lockerman & Ashmore
127 Peachtree Street
Atlanta, Ga 30043

Case No. S91CO793

FOOD GIANT, INC. V. WILLIAM C. PORTER

COURT OF APPEALS CASE NO. A90A2323

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Very truly yours,

JOLINE B. WILLIAMS
Clerk

APPENDIX C

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

Civil Action File Number 86A-27012-3

WILLIAM C. PORTER,
Plaintiff

vs.

FOOD GIANT, INC., and MAX ALTERMAN,
Defendants

FOOD GIANT, INC.,
Cross-Claim Plaintiff,

vs.

MAX ALTERMAN,
Cross-Claim Defendant

ORDER

The above-styled case came on for oral argument before the Court on April 6, 1990 on DEFENDANT FOOD GIANT, INC.'s MOTION FOR SUMMARY JUDGMENT. The parties appeared through counsel and presented argument for the Court's consideration. And the Court, having given extensive time and thought to the arguments and citations presented by the parties, and after a thorough review of the record, hereby finds as follows:

The Court has again read the myriad of cases which were presented in March, 1988 both in support of and in

opposition to this Defendant's Motion to Dismiss. Subsequent to that prior motion the Court has now had the benefit of additionally persuasive, if not controlling, federal case law to consider. Particularly, *Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989) and *Degan v. Ford Motor Company*, 869 F.2d 889 (5th Cir. 1989). In addition, the Court relies on *Time Insurance Company, Inc. v. Roberts et al.*, 191 Ga. App. 766 (1989) in finding that it appears that the Plaintiff's complaint relates to an employee welfare benefit plan as defined under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, that the cause of action upon which this Plaintiff sues is post January 1, 1975, and that said action against Defendant Food Giant, Inc. is therefore preempted by ERISA.

Having found that Plaintiff's claims against Defendant Food Giant, Inc. are preempted by ERISA, this Court further finds that it has jurisdiction over Plaintiff's claims only in so far as he is entitled to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan. 29 U.S.C. § 1132(a)(1)(B).

Accordingly, the Court hereby DISMISSES COUNT ONE and COUNT TWO and those portions of COUNT SIX and COUNT SEVEN as to relief requested from Defendant Food Giant, Inc.

The Court expressly determines that there is no just reason for delay and expressly directs entry of a final judgment as to the above dismissal pursuant to O.C.G.A. § 9-11-54(b).

It further appears to the Court that there are genuine issues of material facts unresolved as to the Plaintiff's claim against Food Giant, Inc. that remains within the jurisdiction of this Court and that Defendant Food Giant, Inc. is not entitled to a judgment as matter of law. Accordingly, Defendant's Motion is DENIED.

DEFENDANT MAX ALTERMAN'S MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF PLAINTIFF and CROSS-CLAIM DEFENDANT MAX ALTERMAN'S MOTION FOR SUMMARY JUDGMENT AS TO THE CROSS-CLAIM OF DEFENDANT FOOD GIANT, INC. are hereby set for oral argument on September 5, 1990 beginning 1:00 p.m. in Room 606 of the DeKalb County Courthouse.

IT IS ORDERED.

This 16th day of July, 1990.

/s/ Anne Workman
ANNE WORKMAN
State Court of DeKalb County
Judge

APPENDIX D

IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

Civil Action File No. 86A-27012-3

WILLIAM C. PORTER,
Plaintiff,

v.

FOOD GIANT, INC., and MAX ALTERMAN,
Defendants.

FOOD GIANT, INC.,
Cross-Claim Plaintiff,

v.

MAX ALTERMAN,
Cross-Claim Defendant.

ORDER

By Order dated July 16, 1990 and filed with the Clerk on July 17, 1990, this Court granted in part Defendant Food Giant, Inc.'s Motion for Summary Judgment and dismissed Count One and Count Two of Plaintiff's Amended and Recast Complaint, as well as Count Six and Count Seven as to relief requested from Defendant Food Giant, Inc. The Court directed that final judgment be entered as to said dismissals pursuant to O.C.G.A. § 9-11-54(b).

The Court's July 16, 1990 Order also held that Defendant Food Giant, Inc. was not entitled to summary judgment as to Count Three, which the Court found to be governed by the federal Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1132(a)(1)(B). Pursuant to the Court's Order, this claim under ERISA is the only remaining claim against Defendant Food Giant, Inc.

Food Giant's motion for summary judgment also raised the issue of whether Plaintiff was entitled to a trial by jury on a claim arising under ERISA. The Court's July 16, 1990 Order did not expressly address this issue. In light of the Court's ruling that Plaintiff's only remaining claim is governed by ERISA, the Court now rules that Plaintiff is not entitled to have this claim tried to a jury as a mater of right. *Blake v. Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525 (11th Cir. 1990) and cases cited therein. The Court also rules that it is within this Court's discretion to allow the case to be tried to a jury pursuant to O.C.G.A. § 9-11-39(b).

As Notices of Appeal and Cross-Appeal of the Court's July 16, 1990 Order have been filed, the Court believes that it would benefit all concerned if the issues addressed above, which were properly before the Court at the time the July 16, 1990 Order was entered, were presented to the Court of Appeals along with all other matters ruled upon in the Court's July 16, 1990 Order. As Plaintiff's costs of appeal are being paid contemporaneously with the entry of this Order and Defendant Food Giant, Inc.'s costs of cross-appeal have not yet been paid, this Court retains jurisdiction to amend the July 16, 1990 Order.

Therefore, the Court's July 16, 1990 Order is amended to incorporate the rulings set forth above. The remainder of that Order is unaffected by this amendment. The Court further directs that the amendment set forth above be entered *nunc pro tunc*, provided that such entry

is not construed as precluding any party's right to appeal as to any issue addressed in the Court's Amended Order.

SO ORDERED this 30th day of August, 1990, *nunc pro tunc*, July 16, 1990.

State Court of Dekalb County

/s/ Anne Workman
ANNE WORKMAN
Judge

ORDER PREPARED BY:

/s/ Christopher S. Miller
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APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. C87-222A

WILLIAM C. PORTER,
Plaintiff,

vs.

FOOD GIANT, INC. and MAX ALTERMAN,
Defendants.

ORDER

This action is before the court on Plaintiff's motion to remand and on Defendant Food Giant's motion to dismiss. Plaintiff has also moved for leave to file a supplemental response to Defendant's motion to dismiss and requests that the court defer ruling on the motion to dismiss.

Plaintiff William Porter originally brought this action alleging a breach of contract claim in DeKalb County, Georgia. Porter alleged that Defendants Food Giant, Inc. ("Food Giant"), his former employer, and Max Alterman, a Food Giant agent, breached his employment contract. Plaintiff had worked for Food Giant from 1957 until 1970. In 1973, he returned to work for Food Giant and remained there until 1982. Plaintiff claims that in 1973, Max Alterman promised him that if he returned to work for Food Giant, he would receive retirement benefits as though he had not interrupted his service with Food Giant. Plaintiff claims that Defendants have breached this agreement.

Defendant Food Giant was served on October 6, 1986 and filed its answer October 30, 1986. Defendant Max Alterman filed his *pro se* answer admitting the averments of the complaint on October 14, 1986. Defendant Food Giant also filed a motion to dismiss, arguing in part that Plaintiff's claim is preempted by Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* On January 23, 1987, Plaintiff amended his complaint to add a second claim based on ERISA. On February 9, 1987, Defendant Food Giant petitioned for removal and the action was removed to this court. Defendant Food Giant has renewed its motion to dismiss in this court. On March 23, 1987, Defendant Food Giant amended its removal petition by joining Max Alterman in the petition.

Plaintiff has moved to remand the action to state court on the grounds that Defendants' removal petition was untimely filed in February 1987 because the original complaint had been served October 6, 1986. Plaintiff also maintains that the removal petition was faulty because Max Alterman did not timely join the petition. Defendant Food Giant opposes the motion to remand arguing that the removal petition was timely because the action could not have been removed until Plaintiff amended the complaint to add an ERISA claim. Food Giant also argues that the removal was not flawed by Alterman's untimely joinder in the petition since it claims Alterman is not an indispensable party who must timely join the petition.

28 U.S.C. § 1446(b) provides that a removal petition must be filed within thirty days of defendant's receipt of the complaint, or if the initial pleading is not removable, within thirty days of defendant's receipt of an amended pleading from which it can be ascertained that the action is subject to removal. Plaintiff claims that the action should have been removed within thirty days of October 6, 1986 since the complaint was subject to

an ERISA preemption defense. Food Giant maintains that the action could not be removed until the complaint was amended to include an ERISA claim.

It is well-settled that an action may be removed to federal court when there is a federal question on the face of plaintiff's well-pleaded complaint. *Gully v. First National Bank*, 299 U.S. 109 (1936); *First Federal Savings & Loan Association of Lake Worth v. Brown*, 707 F.2d 1217, 1220 (11th Cir. 1983). Furthermore, a defense that a plaintiff's state law claim is preempted by ERISA does not provide the basis for removal when the complaint contains no federal question on its face. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13-14 (1983). Since Food Giant's preemption defense does not establish the basis for removal, the action could not be removed until Plaintiff amended to add an ERISA claim on January 23, 1987. Therefore, Defendant Food Giant's February 9, 1987 petition for removal was timely filed.

Even so, Plaintiff has argued that the petition is flawed because Max Alterman did not timely join the removal petition. Nominal parties, unlike indispensable parties, need not join a removal petition and a nominal party is one in whose absence the court can enter final judgment "consistent with equity and good conscience which would not be in any way unfair or inequitable to plaintiff." *Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressman and Assistants' Local 349*, 427 F.2d 325, 327 (5th Cir. 1970).

Plaintiff seeks relief from Max Alterman in both counts of his complaint. Therefore, Alterman clearly has an actual interest in the outcome of this litigation and cannot be classified a nominal party under *Tri-Cities*. As such, he must timely join the petition for removal. Id., at 327. Since he has not done so, the petition for removal is defective and the action is remanded to state court.

Accordingly, it is not necessary to consider Defendant Food Giant's motion to dismiss or Plaintiff's motions for leave to file a supplemental response to Defendant's motion to dismiss and to defer ruling on the motion to dismiss.

Plaintiff's motion to remand is GRANTED. Defendant's motion to dismiss and Plaintiff's motions for leave to file a supplemental response and to defer ruling on the motion to dismiss are DENIED as MOOT.

SO ORDERED, this 24 day of April, 1987.

/s/ Orinda D. Evans
ORINDA D. EVANS
United States District Judge

Supreme Court, U.S.
FILED
NOV 4 1991
OFFICE OF THE CLERK

(2)

No. 91-263

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FOOD GIANT, INC.,

Petitioner,

v.

WILLIAM C. PORTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION

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November 4, 1991

QUESTION PRESENTED

Where an employer, in 1973, induces a former employee to return to his prior employment by giving oral assurances that he will receive pension rights as if there had been no break in service, does the Employee Retirement Income Security Act of 1974 ("ERISA") preempt the employee's rights under state law to enforce or recover for his reliance on the employer's 1973 promise, even though ERISA provides that it shall not supersede state law with respect to "any act or omission which occurred before January 1, 1975" ?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-263

FOOD GIANT, INC.,

Petitioner,

v.

WILLIAM C. PORTER,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case arises out an action for breach of contract and fraud based on representations made by petitioner Food Giant, Inc., in 1973 to induce respondent William C. Porter to return to his prior employment with Food Giant. The Court of Appeals of Georgia, in a unanimous opinion, held that the trial court improperly dismissed respondent's contract and tort claims as preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, ("ERISA"), because ERISA provides that its provisions do not supersede state law with respect to "any act or omission which occurred" before January 1, 1975. 29 U.S.C. § 1144(b)(1).

In 1957 respondent William Porter was hired by Food Giant, which was then known as Alterman Bros., and continued to work for Food Giant for 13 years until 1970, when he voluntarily left to take a new position with the McCormick Spice Co. In early 1973,

Food Giant set-out to convince Mr. Porter to return to manage one of its stores. The President of Food Giant, Sam Alterman, contacted Mr. Porter about rejoining the firm and, at Mr. Alterman's request, Mr. Porter went to the firm's headquarters to discuss Food Giant's interest in reemploying him with Food Giant's Vice President and Superintendent of Retail Store Operations, Max Alterman. *See* Pet. App. 2a.

Max Alterman also served as the secretary of Food Giant's retirement program and, in order to persuade Mr. Porter to leave McCormick, promised him that if he returned to work for Food Giant, his seniority rights for the thirteen years he had already spent with Food Giant would be reinstated.[1] This included an assurance that Food Giant's retirement program would provide benefits on the same basis as if there had been no break in Mr. Porter's service with Food Giant. Mr. Porter's testimony concerning this pledge has been confirmed by Max Alterman in an October 1984 letter to Food Giant's Insurance Director, in his answer to the plaintiff's complaint, and in an affidavit filed in this action. *See id.* Food Giant has not disputed that Max Alterman had full authority to make this commitment on its behalf.

Mr. Porter immediately accepted Food Giant's offer by resigning his position with McCormick and returning to work with Food Giant. He served an additional nine and a half years with Food Giant until 1982 when he left after 22½ years of service.

When Food Giant refused to pay retirement benefits in accordance with its representations in 1973, Mr. Porter brought this action against Food Giant and Max Alterman in the State Court of DeKalb County, Georgia, seeking damages under state law for breach of contract, and fraud and misrepresentation. After Food Giant filed a motion to dismiss on the basis that the entire action was preempted by ERISA, Mr. Porter filed an amended complaint adding an alternative count for recovery under ERISA. Food Giant's motion to dismiss was denied.[2]

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[1] This was subject to an exception, which is not relevant here, that Mr. Porter's vacation time would not exceed that granted new employees.

[2] Food Giant removed the action to the United States District Court for the Northern District of Georgia based on the ERISA count, but the district court found that removal was improper and remanded the action to state court. *See* Pet.

Food Giant then filed a motion for summary judgment. Food Giant argued that it had no obligation to honor any oral representations made to Mr. Porter in 1973 because the ERISA legislation passed in 1974 requires that modifications to an employee benefit plan must be in writing. 29 U.S.C. § 1102(a)(1); *see Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) (oral agreements concerning pension benefits are not enforceable under ERISA). With respect to Mr. Porter's claims that Food Giant's oral representations gave rise to liability under state contract and tort law, Food Giant argued that these claims are preempted because ERISA provides that it "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" effective January 1, 1975. 29 U.S.C. § 1144(a).

In response, Mr. Porter argued that ERISA did not preempt state contract or tort law remedies for Food Giant's 1973 conduct because it expressly provides that it shall *not* supersede state law with respect to "any act or omission which occurred" before January 1, 1975. 29 U.S.C. § 1144(b)(1). Mr. Porter also argued that, even if his claims were governed by ERISA, ERISA did not bar recovery because the oral commitments made by Max Alterman were not modifications of the pension plan, but implemented written provisions of the plan that authorize disregarding breaks in service for individual employees.

The State Court of DeKalb County ruled that Mr. Porter's state law claims were preempted by ERISA, but that genuine issues of material fact precluded judgment on Porter's claim under ERISA. It entered a final judgment pursuant to O.C.G.A. § 9-11-54(b), which is identical to Fed. R. Civ. P. 54(b), to permit immediate review of the preemption ruling. Pet. App. 7a-9a.

The Georgia Court of Appeals reversed. It recognized that federal circuit courts are divided over the interpretation of the "act or omission" language, but found that, in this case, "the acts or omissions giving rise to the cause of action occurred in 1973, when Alterman induced Porter to return to Food Giant's employ by promising him that his full seniority rights . . . would be restored and that the 'acts or omissions' [exception] from ERISA clearly applies." *Id.* at 5a. It also rejected Food Giant's arguments that

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App. 13a-16a.

there were no material facts in dispute concerning the state law and ERISA claims. *Id.* After the Georgia Supreme Court unanimously denied its petition for certiorari, Food Giant filed its petition for certiorari with this Court. *Id.* at 6a.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. Respondent does not dispute that there are conflicts in the case law concerning the interpretation of the "act or omission" exception to ERISA preemption. The conflicts, however, are not those portrayed by this Petition, and review of this case does not provide a proper vehicle for resolving these conflicts. The federal circuit courts, with the isolated exception of the Fifth Circuit, have sought to apply the "act or omission" clause in a practical manner based on the facts presented in each case. In doing so, the courts have disagreed on the jurisdictional effect of the clause, and have emphasized different factors in determining whether state or federal law should govern when applying pension plan provisions to pre-1975 events. But the conflicts that emerge from these cases are not presented in this case, which involves no questions of federal jurisdiction and concerns the enforceability of pre-1975 oral assurances directed at a specific individual to induce him to provide a benefit to the employer. Moreover, because this exception to preemption only applies to cases involving an act or omission before January 1, 1975, its significance will continue to decline over time, reducing any justification for review by this Court.

2. Contrary to Petitioner's argument, the decision of the Supreme Court of Georgia is not necessarily in conflict with the rule applied in the federal courts of Georgia. The Eleventh Circuit, which has jurisdiction over the federal courts in Georgia, has never addressed the interpretation of Section 1144(b)(1). Although the Eleventh Circuit has adopted the pre-September 30, 1981, precedents of the Fifth Circuit, it is not clear whether the Eleventh Circuit will give effect to the Fifth Circuit's construction of Section 1144(b)(1). Consequently, Petitioner's contention that there is "an irreconcilable conflict between the state and federal courts of Georgia," Petition at 7, is, at best, premature until the Eleventh Circuit addresses this issue.

3. The decision below is not at odds with the language of

ERISA, nor with the Congress' intent in passing the statute. To the contrary, Congress explicitly provided that ERISA shall not displace state law with respect to any act or omission before January 1, 1975 and the interpretation adopted by the court below, and other federal and state courts, is necessary to avoid the burdens that would be imposed by retroactive application of ERISA to pre-1975 conduct performed in reliance on state law.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT A PROPER VEHICLE FOR RESOLVING THE INTERPRETATION OF THE "ACT OR OMISSION" EXCEPTION TO ERISA PREEMPTION.

In order to avoid the retroactive application of its provisions, ERISA provides that it shall not supersede state laws "with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1). Neither the other provisions of ERISA nor the legislative history elaborate on what acts or omissions are included in this exception, and, given the diverse contexts in which pension disputes arise, it is not surprising that the efforts of courts to address this provision have led to fact-oriented applications.

Review of the decision of the Supreme Court of Georgia here does not provide an appropriate vehicle for resolving the interpretation of the "act or omission" clause for three reasons. First, the sharp split among the courts that petitioner portrays does not exist. With the isolated exception of the Fifth Circuit, all of the courts that have addressed this provision have sought to develop its interpretation by focusing on the significance of the pre-1975 acts or omissions involved in a particular claim, as the Georgia courts did in the decisions below. Second, the principal differences that have arisen in the case law concern questions of federal jurisdiction and pension plan interpretation that are not presented by the decision in this case. Third, because it only applies to acts or omissions prior to 1975, the significance of the "act or omission" clause will continue to decline as time passes, and the narrow factual context presented here does not provide an appropriate means for providing guidance on its interpretation.

A. The Conflict of Majority and Minority Views Portrayed By Petitioner Does Not Exist.

Petitioner urges the Court to grant certiorari in this case on the basis that "there is a clear and direct conflict" among the circuits. Petition at 10. According to Petitioner, the conflict is between a majority view that follows the Fifth Circuit's decision in *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981), in concluding that "ERISA nearly always preempts state law if benefits are denied after January 1, 1975," Petition at 12, and a minority view, exemplified by the decision below, which focuses on a "fact-based analysis concerning what pre-ERISA acts occurred." *Id.* at 11. Examination of the cases, however, shows that the majority/minority conflict Petitioner portrays is neither clear nor direct. To the contrary, the construction of Section 1144(b)(1) in the 1981 Fifth Circuit decision upon which Petitioner relies represents not only a minority view, but an isolated precedent that has not been embraced by other state and federal courts.

The Fifth Circuit's decision in *Woodfork* was among the first circuit court decisions to address the "act or omission" provision of § 1144(b)(1).[3] The factual situation presented in *Woodfork* involved a union member who, because of a disciplinary proceeding in 1964, lost his seniority status and was unable to secure further work with employers that participated in the union's pension plan. When he obtained the minimum age for pension eligibility in 1969, Woodfork inquired about pension benefits and was told that he was ineligible because he had not accumulated 90 days of pension credit during the preceding two years, as required by the plan. Woodfork, however, did not submit a formal request for pension benefits until after ERISA was enacted in 1974, at which time the pension plan formally confirmed that he was ineligible for benefits. *Id.* at 968. Woodfork originally sought pension benefits under federal law but, to avoid a change of venue, amended his complaint to substitute state claims. *Id.* at 969. He

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[3] The Eighth Circuit had previously addressed the issue in *Winer v. Edison Bros. Stores*, 593 F.2d 307 (8th Cir. 1979), and the First Circuit issued its decision in *Quinn v. Country Club Soda Co.*, 639 F.2d 838 (1st Cir. 1981), just two months before the Fifth Circuit's decision in *Woodfork*.

argued that his state claims were not preempted because his cause of action arose before January 1, 1975, and, alternatively, that, because he was denied benefits on the basis that he did not satisfy the pension plan's requirements when he obtained the minimum age for eligibility in 1969, his claims were based upon an "act or omission before January 1, 1975." *Id.* at 970.

The Fifth Circuit concluded that the record was inadequate to resolve whether Woodfork's cause of action arose before January 1, 1975, and, therefore, further proceedings were necessary to determine whether his state claims were preempted by ERISA. *Id.* at 974. It also addressed the "act or omission" issue, but did not limit its discussion to the particular facts presented by Woodfork's case. Instead, it articulated a general construction of the relationship between the "cause of action" and the "act or omission" exceptions, stating that "[w]e think a reasonable construction of the statute is to confine the use of the latter exception to acts or omissions that set in motion legal proceedings other than causes of action." *Id.* at 971. Thus, under the *Woodfork* construction, the only function of the "act or omission" exception is to prevent ERISA from preempting pre-1975 state proceedings, such as pension-related administrative proceedings and criminal prosecutions. *Id.* Otherwise, ERISA preempts state law with respect to any cause of action that arises after January 1, 1975, even if the claim concerns pre-1975 conduct.

In the ten years since the *Woodfork* decision, *no* other federal circuit has endorsed this construction. Instead, other courts have applied the "act or omission" provision by focusing on whether the particular factual situation involved in the dispute should be governed by state or federal law. *See* Annotation, *What Constitutes an "Act or Omission" For Purposes of § 514(b)(1) of Employee Retirement Income Act of 1974*, 52 A.L.R. Fed. 515, 518 (1981). Thus, none of the decisions from other circuits that Petitioner cites as the "majority view," *see* Petition at 12 n.12, endorse or adopt the Fifth Circuit's construction in *Woodfork*. Although the result in some of these decisions would be the same under the construction in *Woodfork*, the reasoning is different. Moreover, the result in at least one case is, in fact, contrary to *Woodfork* and to the rule that Petitioner portrays as the majority view.

For example, in *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983), a case

Petitioner cites as an example of the "majority view," the Seventh Circuit addressed whether state law or ERISA governed claims by (1) employees who had voluntarily withdrawn from the pension plan and signed releases waiving their pension credits prior to the enactment of ERISA, but were denied benefits after 1975; and (2) employees who were laid-off prior to 1975, but were denied benefits after the enactment of ERISA because the employer claimed that the lay-off resulted in a forfeiture of their pension credits. The court held that the claims of the employees who signed waivers prior to 1975 were governed by state law, not ERISA, saying that "plaintiffs cannot rely on the fact that they allegedly discovered the effects of their waivers after ERISA, if critical acts constituting their effective waivers occurred before ERISA came into effect." *Id.* at 1233. This result and reasoning is contrary to *Woodfork*, and contrary to Petitioner's argument that the Seventh Circuit has adopted a "majority view" that the "critical" act is always the denial of benefits. *See* Petition at 12. With respect to the claims of the employees who had been laid-off prior to 1975, the Seventh Circuit held that ERISA preempted state law with respect to these claims. 686 F.2d at 1234. This holding, however, was not based on the construction in *Woodfork*, but on the Court's conclusion that for these claims "the critical act for purposes of ERISA was not the layoffs, but was the denial of plaintiffs' application for pension credits." *Id.* at 1234. This effort to identify the "critical act" in the context of each claim reflects the analysis Petitioner labels as the minority view. *See* Petition at 11.

The other cases Petitioner cites as the "majority view" also do not endorse *Woodfork*, but focus on the factual context presented by the case. While these cases hold that the post-ERISA denial of benefits *may* be the relevant "act or omission" for determining whether ERISA or state law applies, they do not hold, as Petitioner claims, that "the only 'significant' or 'critical' act is" the denial of benefits. Petition at 12.[4] Indeed, the

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[4] *See Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307, 312-13 (8th Cir. 1979); *Tanzillo v. Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985); *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 202 (1989); *see also Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49, 51 (3d Cir. 1985) (Third Circuit holds that where cause of action accrues after 1975, but significant acts occurred prior to 1975, "act or omission"

reasoning of some of the cases Petitioner labels as the "majority view" has been endorsed in the decisions that Petitioner criticizes as the minority view. *See, e.g., Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1503 (9th Cir. 1983) (citing Eighth Circuit decision *Winer v. Edison Bros. Stores Pension Plan* with approval).

Therefore, the majority/minority division Petitioner portrays simply does not exists. With the exception of *Woodfork*, no other federal or state court has adopted a rigid rule that the "act or omission" exception never applies to cases where the denial of benefits occurs after January 1, 1975. To the extent that the decision below rejected the Fifth Circuit's construction in *Woodfork*, it was not rejecting a "majority view" but following the course which has been adopted by every federal circuit court other than the Fifth Circuit.[5]

B. The Principal Conflicts Over The Interpretation Of The "Act Or Omission" Provision Are Not Presented By This Case.

Outside the Fifth Circuit, courts have adopted the view that the "act or omission" clause "seems to have been inserted 'to permit courts to apply state law, even if the cause of action accrued after January 1, 1975, in cases where that result most fairly accommodates the interests of all affected parties -- the beneficiaries, participants, and fiduciaries of and contributors to ERISA trusts.'" *Quinn v. Country Club Soda Co., Inc.*, 639 F.2d 838, 841 (1st Cir. 1981) (quoting *Bacon v. Wong*, 445 F.Supp. 1189, 1192 (N.D. Cal. 1978)); *accord Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307, 313 (8th Cir. 1979). This effort to assess the competing interests on a case-by-case basis has, not surprisingly, led to differences among the circuits. These differences, however,

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clause may dictate that federal court apply state law to the claim).

[5] Petitioner also cites three decisions by state intermediate appellate courts, two of which are in accord with the decision below and one of which is contrary. *See* Petition at 15-17. These decisions merely reflect the same differences that have arisen between the Fifth Circuit and other federal courts and do not provide an independent basis for Supreme Court review, particularly given the fact that they are decisions by intermediate state appellate courts.

are not fairly presented for review by the decision at issue here.

For example, federal courts have divided over whether federal courts lack jurisdiction over claims that involve an act or omission before January 1, 1975 or whether the provision merely dictates that the federal court must apply state law. *Compare Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1983) (provision is jurisdictional), *and Quinn v. Country Club Soda Co.*, 639 F.2d at 841 (same), *with Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d 49, 51 (3d Cir. 1985) (provision dictates choice of law); *see also Reiherzer v. Shannon*, 581 F.2d 1266, 1272 (7th Cir. 1978) (ERISA provides for federal jurisdiction and application of federal common law for any cause of action that arises after it was enacted). This issue of federal jurisdiction, however, is not presented by the decision of the Georgia Supreme Court, here. There is no dispute that the state courts of Georgia have jurisdiction to adjudicate the claims below whether they are governed by state law or by ERISA. *See* 29 U.S.C. § 1132(e)(1) (state courts have concurrent jurisdiction over claims for benefits).

In addition, most of the cases involving the "act or omission" language have involved disagreements over what law should govern when benefits are denied after January 1, 1975 based on the application of general eligibility provisions to pre-ERISA events. Some courts have emphasized that the denial of benefits resulting from a post-January 1, 1975, application of a pension plan's provisions, even if it involves consideration of pre-ERISA events, should be governed by ERISA's fiduciary standards. *See Tanzillo v. Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985); *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. denied*, 110 S.Ct. 202 (1989). Other courts have stressed that, when the denial is the consequence of "unequivocal pre-effective date interpretations of or exercises of discretion under the plan," the validity of the denial should be governed by the state law that prevailed at the time of the event. *Menhorn*, 738 F.2d at 1501; *accord Lamontagne v. Pension Plan of the United Metal & Machine Pension Fund*, 869 F.2d 153, 156 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 72 (1990); *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d at 894-95. Although arguably in conflict, the two lines of cases can be reconciled because the cases holding that state law should apply have also stated that when the

denial involves "a significant act of discretion under or interpretation of the plan which took place after ERISA's effective date," the validity of the denial should be assessed under ERISA rather than state law. *Menhorn*, 738 F.2d at 1502; *see also Tanzillo*, 769 F.2d at 144 n.5 (rejecting *Menhorn* but acknowledging that it is distinguishable); *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230, 1232-34 (state law applies to claims of employees who signed waiver acknowledging no right to benefits before 1975, but where denial is based on pre-1975 layoffs that do not provide clear notice of their effect on benefits, the critical act is the post-ERISA interpretation of plan and denial of benefits).

The issues raised by these pension plan-interpretation cases, however, are not squarely presented by the facts in this case. This case does not focus on general plan provisions, but on an assurance by Food Giant, personally addressed to Mr. Porter, that certain pension benefits would be provided if he returned to work for Food Giant. Moreover, there is no question of ambiguity, discretion, or lack of notice with respect to the representations made to Mr. Porter concerning his pension status. Nor is there an issue concerning whether ERISA's fiduciary standards should apply to the denial of the claim since the aspect of ERISA on which Food Giant relies is not its fiduciary standards, but the requirement that plan provisions be written rather than oral. Accordingly, this case does not present an appropriate vehicle for addressing the differences reflected in the federal circuit court cases.

C. The Declining Significance Of The "Act or Omission" Provision Counsels Against Review Of The Narrow Issues Presented By This Case.

As the cases above indicate, questions concerning the application of the "act or omission" provision may arise in a myriad of different factual situations.[6] The case-by-case development of

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[6] Application of the provision also arises in other contexts such as mistaken payments to the pension fund, *see, e.g., Reuther v. Trustees of Trucking Employees of Passaic & Bergen County Welfare Fund*, 575 F.2d 1074 (3d Cir. 1978), and illegal conduct by plan trustees which does not involve the denial of benefits, *see, e.g., Wayte v. Rollins International, Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (2d Dist.

the interpretation of this provision in different contexts is inevitable, and the benefits of Supreme Court review are likely to be limited. *Cf. Pierce v. Underwood*, 487 U.S. 552, 561-63 (1988) (where questions involve multifarious factual situations and are not susceptible to useful generalization, intense appellate scrutiny is unlikely to be useful). This case, in particular, presents only a narrow subset of the factual situations in which the "act or omission" provision may be at issue. In contrast to the numerous cases concerning the effect of the "act or omission" clause on denials involving the interpretation of general plan provisions, only two other reported cases involve the situation involved here, the enforceability of pre-1975 oral representations. *See Petrolite Corp. v. Barnhouse*, 812 S.W.2d 341 (Tex. Civ. App., 13th Dist. 1991); *Degan v. Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989).[7]

In addition, the "act or omission" provision operates as a grandfather clause and its significance will continue to decline as time passes. Even under the broadest interpretation, the "act or omission" exception to ERISA preemption only applies to causes of actions where the "critical" or "significant" acts or omissions occurred before 1975. Although Petitioner speculates that a significant number of beneficiaries may be "affected by a wide variety of pre-ERISA acts or omissions," *see* Petition at 15 n.14, the number of cases where the "critical" actions at issue occurred over sixteen years ago is inherently limited, and will inevitably decrease as time passes.

II. THE DECISION OF THE GEORGIA SUPREME COURT IS NOT DIRECTLY IN CONFLICT WITH PRECEDENT BINDING ON THE FEDERAL COURTS IN GEORGIA.

As an independent basis for granting review, Petitioner argues that the decision of the Supreme Court of Georgia not to

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1985).

[7] In other cases where the enforceability of pre-ERISA oral contracts has been at issue, the effect of the "act of omission" provision has not been addressed, apparently because neither party relied on Section 1144(b)(1). *See Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 579 (1991).

adopt the construction offered by the Fifth Circuit in *Woodfork* "conflicts with binding precedent in the federal courts of Georgia." Petition at 17-18. This assertion, however, is based on an unjustified assumption.

The federal courts of Georgia are governed by the decisions of the Eleventh Circuit, and the Eleventh Circuit has never addressed the interpretation of Section 1144(b)(1). Petitioner's argument is based on the fact that the Eleventh Circuit has adopted the pre-September 30, 1981 precedents of the Fifth Circuit as its own, *see Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981), and *Woodfork* was decided by the Fifth Circuit in April, 1981. As discussed above, however, the construction of Section 1144(b)(1) that Petitioner relies upon from *Woodfork* went beyond the facts presented in the case and could be regarded as *dicta*. Thus, although the Eleventh Circuit has adopted *Woodfork* as precedent, it does not follow that it has also adopted the analysis of Section 1144(b)(1) offered by the Fifth Circuit as binding in other factual situations. The Eleventh Circuit may, as it has in the past, distinguish and refuse to extend prior Fifth Circuit precedent. *Cf. Gilmore v. City of Atlanta*, 864 F.2d 734, 738 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 70 (1990), (distinguishing prior Fifth Circuit precedent on its facts), *and id.*, at 746-47 (Clark, J., concurring in part and dissenting in part) (criticizing majority for limiting prior Fifth Circuit precedent). Post-1981 decisions of the Fifth Circuit extending *Woodfork* to other contexts, *see Degan v. Ford Motor Co.*, 869 F.2d 889, 894 (5th Cir. 1989), are *not* binding on the Eleventh Circuit and it is not known whether the Eleventh Circuit, if it ever has to decide this issue, will feel bound to follow the *dicta* in *Woodfork*, or would adopt the approach endorsed by other courts.

III. THE DECISION BELOW IS IN ACCORD WITH THE LANGUAGE AND INTENT OF ERISA.

Petitioner argues that certiorari should be granted because the decision of the Supreme Court of Georgia is "'fundamentally at odds with the goal of uniformity that Congress sought to implement' in enacting ERISA." Petition at 5 (quoting *Ingersoll-Rand v. McClendon*, 111 S.Ct. 478, 484 (1990)). This argument is based on the erroneous premise that exceptions to preemption

necessarily undermine the foundations of ERISA, and certainly does not provide a basis for granting review.

Congress explicitly provided that ERISA shall not supersede state law, not simply when the "cause of action arose" before January 1, 1975, but also with respect to "any act or omission which occurred" before January 1, 1975. 29 U.S.C. § 1144(b)(1). As this Court has observed, "ERISA did not become effective until January 1, 1975" and it "expressly disclaims any effect with regard to events before that date." *E.I. Malone v. White Motor Corp.*, 435 U.S. 497, 499 n.1 (1978). Numerous federal and state court decisions going back over ten years have concluded that the plain language of this provision indicates that Congress intended that ERISA should not be applied retroactively to acts or omissions prior to 1975 just because the cause of action accrues after the effective date of ERISA. *See Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 541 (9th Cir. 1980); *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d at 893. Indeed, even some of the cases Petitioner cites for support recognize that "[t]he phrase 'act or omission' . . . apparently refers to those significant facts which give rise to a claim but which fall short of establishing a cause of action." *Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d at 313; *accord Jameson v. Bethlehem Steel Corp. Pension Plan*, 765 F.2d at 51-52 ("act or omission" provision is intended to ensure that ERISA is not applied retroactively to incidents occurring before January 1, 1975).

The enactment of ERISA necessitated a transition from state law to federal law. The decisions giving effect to the "act or omission" clause simply seek to minimize the disruption caused by the transition:

> The clear practical import of the act or omission clause is to prevent past conduct of pension plan fiduciaries and contributors from being judged retroactively under the standards established by ERISA simply because the conduct generates consequences subsequent to the ERISA effective date that give rise to what is, technically, an independent "cause of action."

Quinn, 639 F.2d at 841. Where the critical "act or omission" occurred when state law governed the conduct, federal law should

not be applied retroactively to impose duties that did not exist at the time. *See Jameson*, 765 F.2d at 51.

Thus, contrary to Petitioner's charge that these decisions impose "disruptive burdens" on plan sponsors and "uncertain interpretation[s]" on employee-participants, Petition at 5, 9, they, in fact, seek to avoid inconsistent burdens imposed by a retroactive change in substantive law. These decisions hold that the conduct of plan sponsors should be evaluated based upon the state law in effect at the time of the conduct, rather than the subsequently enacted standards of ERISA. *See, e.g., Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 656 (9th Cir. 1983) (claimant cannot rely upon ERISA to challenge validity of waiver signed in 1971). Similarly, the enforceability of a promise made to an employee like Mr. Porter should be evaluated based on the state law in effect at that time, rather than being tested by new requirements introduced two years later by ERISA. *See* Pet. App. at 5a. These results do not undermine the goals of ERISA, but seek to implement an exception to preemption that Congress specifically provided to permit the transition from the pre-1975 law to ERISA to proceed in a sensible manner.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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No. 91-263

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FOOD GIANT, INC.,
Petitioner,

v.

WILLIAM C. PORTER,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

ARGUMENT

I. THERE IS A CLEAR AND DIRECT CONFLICT AMONG THE CIRCUIT COURTS AS TO THE MEANING OF THE EXCEPTION TO ERISA'S BROAD PREEMPTION OF STATE LAW.

Respondent first concedes that "there are conflicts in the case law concerning the interpretation of the 'act or omission' exception to ERISA preemption." Resp. Br. at 4.[1] He later asserts that the conflict "is neither clear nor

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[1] Throughout this Reply, "Pet." will refer to the Petition for a Writ of Certiorari, and "Resp. Br." will refer to the Respondent's Brief in Opposition.

direct," Resp. Br. at 6, but eventually acknowledges an "arguabl[e]" conflict between "two lines of cases" that he then attempts to reconcile. Resp. Br. at 10. With eight federal courts of appeals and four state courts having considered the matter, the conflict among the decisions pointed out by Petitioner and acknowledged even by Respondent is far from merely "arguable" and cannot be reconciled by Respondent's fact-based distinctions.

At least seven of the courts that have ruled on the meaning of the exception to ERISA preemption in 29 U.S.C. § 1144(b)(1) of ERISA, including the Georgia Court of Appeals in this case, Pet. at 3a, themselves have stated that a substantial conflict exists among their decisions.[2] As the Fourth Circuit has said:

> [T]wo competing views have evolved. The Third Circuit regards the trustees' act in denying a pension application as an act or omission which is subject to ERISA . . . . By contrast, the First and Ninth Circuits have held that if the trustees' denial is the "inevitable result of unequivocal pre-effective date interpretations" of the plan, then the denial is not reviewable.

Rodriguez v. *MEBA Pension Trust*, 872 F.2d at 72 (citations omitted). The fact that Petitioner and Respondent cannot even agree on how to characterize the nature and extent of the conflict underscores rather than minimizes the need for a resolution by this Court.

The majority of the circuits that have considered the meaning of the exception to ERISA preemption, repre-

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[2] *See Rodriguez* v. *MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. denied*, 110 S.Ct. 202 (1989); *Tanzillo* v. *Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985); *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230, 1234 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. 1981); *Petrolite Corp.* v. *Barnhouse*, 1991 Tex. App. LEXIS 924, *5-*10 (13th Dist. Ct. App. April 11, 1991); *Porter* v. *Food Giant, Inc.*, 198 Ga. App. 736, 402 S.E.2d 766 (1991); *Wayte* v. *Rollins Int'l Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59, 66-67 (1985).

sented by the Third, Fourth, Fifth, Seventh and Eighth Circuits, have adopted a bright line rule that favors federal preemption of ERISA and ensures uniform, consistent application of the federal regulatory scheme, as Congress intended, in lieu of an uncertain fact-based *ad hoc* approach.[3] Thus, the majority approach is not characterized exclusively by the Fifth Circuit's decision in *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981), as Respondent erroneously asserts throughout his brief. Resp. Br. at 4, 5, 6, 7, 8, 9, 13.[4]

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[3] *See Tanzillo* v. *Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d 140, 144 (3d Cir. 1985); *Rodriguez* v. *MEBA Pension Trust*, 872 F.2d 69, 72 (4th Cir.), *cert. denied*, 110 S.Ct. 202 (1989); *Degan* v. *Ford Motor Co.*, 869 F.2d 889, 894 (5th Cir. 1989); *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981); *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Winer* v. *Edison Bros. Stores*, 593 F.2d 307 (8th Cir. 1979).

[4] Although other circuits in the majority do not follow the Fifth Circuit's analysis in *Woodfork* precisely, they all adopt an interpretation of 29 U.S.C. § 1144(b)(1) that is consistent with ERISA's policies and purposes favoring federal preemption and a rule that ensures consistent, predictable application of ERISA's uniform regulatory scheme.

Contrary to Respondent's contentions, the Seventh Circuit's decision in *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983), is entirely consistent with the majority approach. *See* Resp. Br. at 7-8. There were two classes of claimants in *Colgate*. The first group sought to challenge the sufficiency of certain pre-ERISA waivers and their acceptance of payments in lieu of pension benefits. Their post-ERISA "discovery" of these waivers and the issue of the validity of these waivers and payments had nothing to do with ERISA and was not a claim under ERISA. Their ineligibility for benefits was specifically and finally determined prior to ERISA's enactment. The claims of the second group, reliant in part on pre-ERISA breaks in service, however, were held to have been preempted by ERISA because the plan administrator determined, after ERISA's enactment, that the claimants were ineligible for benefits under ERISA and the applicable plan provisions regarding breaks in service. The relevant "act" was the plan administrator's determination. Thus, *Colgate* adopted the bright line rule of the majority of circuits.

Respondent's attempt to recharacterize the various conflicting decisions fails to detract from the central question, that is, the meaning and proper interpretation of the exception to federal ERISA preemption found in 29 U.S.C. § 1144(b)(1). Regardless of how characterized, the crux of the issue is whether Congress intended that the denial of pension benefits years after the effective date of ERISA should be governed by ERISA or, because some of the acts or omissions leading to that denial may have occurred before ERISA was enacted, by the state law ERISA was intended to preempt.[5]

II. THE MULTIPLICITY OF CONFLICTS THAT ARE EXACERBATED BY THE GEORGIA COURT OF APPEALS' DECISION AND THE IMPORTANCE OF THE QUESTIONS RELATING TO FEDERAL PREEMPTION MAKE THIS CASE RIPE FOR REVIEW.

Compounding the existing conflict among the federal circuit courts of appeals on this important question of federal substantive law is the growing number of inconsistent state court precedents that mirror the federal conflict.[6] These mounting conflicts are "fundamentally at odds with the goal of uniformity that Congress sought to implement" by enacting ERISA. *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478, 484 (1990). Now, because of

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[5] Respondent erroneously contends that this case "does not focus on general plan provisions." Resp. Br. at 11. But Respondent's own complaint alleged that he was entitled to pension benefits pursuant to the general plan provisions apart from his claim for damages based on an alleged breach of contract arising from that very same denial of pension benefits under the plan. Porter's Amended And Recast Complaint at 3-5, 7-8; Resp. Br. at 3. Respondent Porter's Amended And Recast Complaint was filed in the Georgia State Court of DeKalb County and was a part of the record before the courts below.

[6] *See Wayte* v. *Rollins Int'l, Inc.*, 169 Cal. App.3d 1, 215 Cal. Rptr. 59 (1985); *Grich* v. *Wood & Hyde Leather Co.*, 74 A.D.2d 183, 427 N.Y.S. 2d 96 (3d Dept. 1980); *Porter* v. *Food Giant, Inc.*, 198 Ga. App. 736, 402 S.E.2d 766 (1991); *Petrolite Corp.* v. *Barnhouse*, 1991 Tex. App. LEXIS 924 (13th Dist. Ct. App. April 11, 1991).

the failure of the Georgia Court of Appeals to follow the precedent binding on the federal courts in Georgia, there are inconsistent precedents in the federal and state courts in Georgia. Thus, in a single state contrary rules of decision further undermine the uniform regulatory scheme embodied in ERISA and leave employers with increased uncertainty as to their obligations regarding pension benefits.[7]

Respondent's argument that there is no conflict among the Georgia state and federal courts because the Eleventh Circuit has not rendered its own opinion on the question of ERISA preemption is a serious misreading of Eleventh Circuit precedent. *See* Resp. Br. at 4, 13. In *Bonner* v. *City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit expressly held:

> [T]he decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit . . . .

Id. at 1207. By its decision in *Bonner*, the Eleventh Circuit adopted the Fifth Circuit's construction of the ERISA preemption statute, along with all other Fifth Circuit precedent as of September 30, 1981, and that construction is binding. Therefore, because the Georgia Court of

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[7] Respondent argues that this case is unimportant because the significance of the "act or omission" clause will decline as time passes. Resp. Br. at 5, 11-12. But over the next twenty years, millions of workers who were participating in pension plans for a significant period of time prior to the effective date of ERISA will be applying for benefits. The pension entitlements of these beneficiaries will undoubtedly be affected by a wide variety of pre-ERISA acts or omissions. The confusion in the courts therefore will continue to have a significant impact for many years to come. *See* Pet. at 15 n.14.

This Court has recognized that questions involving federal preemption of state laws raise significant concerns appropriate for Supreme Court review. *See, e.g., Cipollone* v. *Liggett Group, Inc.*, No. 90-1038.

Appeals failed to follow the Fifth Circuit's decision in *Woodfork* v. *Marine Cooks & Stewards Union*, the state courts of Georgia are now bound by one precedent and the federal courts in Georgia by another.[8]

III. THE STANDARD ADOPTED BY THE GEORGIA COURT OF APPEALS UNDERMINES CONGRESSIONAL INTENT TO ENACT A UNIFORM BODY OF BENEFIT LAW UNDER ERISA TO BE APPLIED AS SOON AS PRACTICABLE.

The fact-based, *ad hoc* approach of the Georgia Court of Appeals and of the First, Second and Ninth Circuits leads to the anomalous result that a post-ERISA "cause of action" based upon a post-ERISA denial of pension benefits may still be governed by state law and provide state law remedies simply because some of the "acts or omissions" relating to the claim occurred prior to ERISA's effective date. Congress intended that ERISA preemption be construed "in its broadest sense,"[9] however, requiring that where a cause of action arises from a denial of benefits by a plan administrator after ERISA's effective date, that denial must be considered the only truly critical act, making the application of ERISA readily apparent.

The courts that have adopted this bright line approach have concluded:

> While the determination of a claim upon the Fund may require the Fund trustees to consider events that have taken place before ERISA's enactment, the act

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[8] Respondent's suggestion, Resp. Br. at 13, that *Woodfork*'s holding "could be regarded as *dicta*," and for that reason not binding, is groundless. The question raised in *Woodfork* was whether certain state claims founded in part on occurrences prior to the enactment of ERISA were preempted by ERISA. The meaning of section 1144(b)(1) was directly in dispute and a necessary part of the court's final determination.

[9] 120 Cong. Rec. 29,933 (daily ed. August 22, 1974) (remarks of Sen. Williams).

> of granting or denying a pension nevertheless involves a contemporaneous construction of the plan's provisions—an "act or omission" to which ERISA[] . . . appl[ies]. . . ."

Tanzillo v. *Local Union 617, Int'l Bhd. of Teamsters*, 769 F.2d at 144; *see* cases cited in n.3 *supra*. This bright line approach construes the statutory exception to preemption as narrowly as possible, thus assuring full federal preemption of the field as soon as practicable, as Congress clearly intended. *See Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981); *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. at 482-84, quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46-47 (1987); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 98-100 (1983).

Focusing on the timing of the denial of benefits provides certainty to employers, plan administrators and claimants and relieves plan participants from having to be ever-vigilant regarding benefits that may be lost because of the timing of certain "critical acts." It also prevents possibly arbitrary or discriminatory determinations regarding benefits (which ERISA was intended to eliminate) under the guise of "secret understandings" and the like.[10] This simple, more predictable rule of decision furthers congressional intent to "minimize the . . . burdens of complying with conflicting directives among States or between States and the Federal Government" regarding pension benefits. *Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. at 484.

The Fourth Circuit summarized the majority view and its advantages in *Rodriguez*:

> While a claim determination may require the plan's trustees to consider pre-ERISA acts, the act of de-

[10] Although it is not directly relevant at this stage, Petitioner does dispute, contrary to Respondent's assertion, Resp. Br. at 2, that Max Alterman had full authority to make a commitment to Respondent, and has filed a crossclaim against Alterman in the court below.

> nying a pension post-ERISA will invariably involve a "contemporaneous construction of the plan's provisions . . . to which ERISA's fiduciary standards apply." Such a view fosters the congressional intent "to extend the protections of ERISA . . . as soon as practicable," so as to "provid[e] . . . ready access to the Federal courts." 29 U.S.C. § 1001(b). It also promotes Congress' intention that exceptions to ERISA's preemption provisions be narrowly construed. Further, [this] approach has the advantage of certainty. Courts need only look to the date of the trustees' determination to decide whether ERISA applies. Finally, equitable considerations support this standard. Plan participants cannot be expected to inquire about benefits until retirement. Because plan trustees will not act on a participant's claim until it is made, their act of denying a claim will inevitably involve a post-ERISA interpretation of the plan.

Rodriguez v. *MEBA Pension Trust*, 872 F.2d at 72-73 (citations omitted).

By permitting application of state law to a significant number of cases nearly twenty years after ERISA's enactment, the approach adopted by the Georgia Court of Appeals and three of the federal circuit courts of appeals critically undermines Congress' policy choices to include certain remedies and to exclude others. *See Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. at 485. The minority's fact-based, *ad hoc* approach, which requires the courts to ascertain which "critical acts" "inexorably" led to a given result, yields inconsistent and uncertain application of the law relating to pension plans. It is "fundamentally at odds with the goal of uniformity that Congress sought to implement" through ERISA. *Id.* at 484.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

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